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JOHN D. DIAMOND; and DIAMOND PHILLIPS, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

VAN PHILLIPS,

Plaintiff,

v.

JOHN D. DIAMOND; DIAMOND
PHILLIPS, INCORPORATED, an Illinois
Corporation; and DOES 1 through 50,
inclusive,

Defendants.

No. C073305 SI

**COUNTER-CLAIM FOR BREACH OF
CONTRACT, COMMON COUNT, COMMON
COUNT IN QUANTUM MERUIT, UNJUST
ENRICHMENT; DEMAND FOR JURY TRIAL**

Judge: Honorable Susan Illston

Complaint Filed: June 22, 2007
Trial Date: None set

JOHN D. DIAMOND; DIAMOND PHILLIPS,
INC., a Illinois corporation,

Counter-Claimant,

v.

VAN L. PHILLIPS, an individual,

Cross-Defendants.

Defendants and Counter-Claimants JOHN D. DIAMOND ("Diamond") and
DIAMOND PHILLIPS, INC. ("DPI") (jointly "Counter-Claimants") hereby allege as follows:

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PARTIES

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2 1. Counter-Claimant John D. Diamond is, and at all times relevant herein
3 was, a citizen of the State of Utah.

4 2. Counter-Claimant Diamond Phillips, Inc., is, and at all times relevant
5 herein was, a corporation licensed in the State of Illinois and doing business in the State of
6 Utah.

7 3. Diamond and DPI are informed and believe and thereon allege that at all
8 times relevant herein, Cross-Defendant VAN PHILLIPS ("Phillips") is and was a citizen of
9 the State of California. Phillips is the brother-in-law of Diamond. Diamond is married to
10 Phillip's sister, Lee Phillips who is also an officer of DPI and an interior designer
11 employed by DPI.

12 **GENERAL ALLEGATIONS**

13 4. In or around December of 2001, Phillips and Diamond on behalf of DPI
14 entered into an oral agreement whereby Counter-Claimants agreed to provide
15 architectural, engineering and interior design services to Phillips, and Phillips agreed to
16 pay the normal and customary fees and costs of Counter-Claimants to DPI on a continuing
17 basis for multiple projects. The oral contract provided that DPI would be paid for its
18 work, labor, materials, and services.

19 5. Thereafter, Cross-Complainants provided architectural, engineering and
20 design services to Phillips and Phillips paid for such services on multiple projects in
21 Northern California until mid-2007. As was their custom and practice, Cross-
22 Complainants generally charged Phillips a percentage of construction budget in addition
23 to hourly fees for time spent with a markup on products or materials provided.

24 6. Counter-Claimants worked on many dozens of architectural and design
25 projects for Phillips for a decade and Phillips expressed his satisfaction with the work of
26 Counter-Claimants by paying invoices presented and by continuing to rehire them.

27 7. In or about 2004, Phillips expressed an interest in purchasing windows
28 and doors for design projects then in progress with DPI. Phillips requested information

1 from Diamond about the possibility of purchasing windows and doors in Utah versus
2 California as a cost-saving measure. Between 2004 and 2007, Diamond and Phillips
3 discussed the possibility of DPI purchasing windows and doors for proposed construction
4 projects owned by Phillips known as the Green House located in Little River, CA, the
5 Farm House and Tea House both located in Albion, CA, the Sausalito Main House located
6 in Sausalito, CA and the Sausalito Guest House located in Sausalito, Ca.

7 8. At the time, Counter-Claimants were providing architectural and
8 engineering services on the same projects and in addition were providing architectural and
9 engineering services on other projects known as Sherwood Forest, White Deer Mountain,
10 Stillwell Point, and the Ranch House, all located in Northern California.

11 9. Diamond informed Phillips in substance that Diamond could purchase
12 windows and doors in Utah from DPI's supplier, Contractors Window Supply, generally
13 below prevailing California pricing. Phillips agreed to this arrangement and requested
14 that DPI order the windows and doors for the above projects.

15 10. With respect to the Sausalito Guest House, Counter-Claimants purchased
16 the windows and doors in 2004 or 2005 and Phillips paid for such windows and doors
17 without complaint. Between 2005 and 2007, Counter-Claimants purchased the windows
18 and doors for the Green House, Tea House, Farm House, and Sausalito Main House.
19 Phillips paid towards the purchase of such windows and doors until approximately the end
20 of 2006. In or about October of 2006, Phillips failed to make payment for windows and
21 doors and continues to refuse to pay for all windows and doors. After the windows and
22 doors were tendered for delivery to Phillips, Phillips refused to take delivery or possession
23 of the windows and doors.

24 11. Thereafter, outstanding billing invoices were submitted to Phillips for
25 architectural, engineering and design services and materials provided and/or tendered on
26 the above referenced design and construction projects. Despite demand, Phillips has
27 refused to pay for architectural and engineering services rendered and refused and failed
28

1 to pay for the complete cost of the windows and doors and further refused to accept
2 delivery of the windows and doors.

3 **FIRST CAUSE OF ACTION**

4 **BREACH OF ORAL CONTRACT**
5 **(By DPI Against Phillips)**

6 12. Counter-Claimants incorporate herein by reference each and every
7 allegation contained in paragraphs 1 through 11 with the same force and effect as if fully
8 recited herein.

9 13. Phillips and Diamond entered into the oral agreement related to Cross-
10 Complainants providing architectural, engineering and design services and the oral
11 agreement related to DPI purchasing for the account of Phillips certain windows and
12 doors for the design and construction projects set forth above. Diamond, on behalf of
13 DPI, agreed to purchase windows and doors and Phillips agreed to pay for such windows
14 and doors. In continuing to utilize the services of Counter-Claimants, Phillips expressly
15 and impliedly agreed to pay the invoices for such services and materials.

16 14. Counter-Claimants fully performed all of the duties and obligations they
17 were required to perform pursuant to the above oral agreements, in conformity with
18 Phillip's instructions and provided architectural, engineering and design services to
19 Phillips and purchased the windows and doors.

20 15. Phillips breached the oral agreements by failing to pay invoices when
21 presented to him, by failing to pay for the invoices for the windows and doors, and by
22 failing to accept tender of delivery and possession of the windows and doors that are
23 currently housed in a warehouse in Utah.

24 16. As a result of Phillips breach of contract, DPI has been damaged in an
25 amount to be determined at trial, plus liquidated, prejudgment interest at the legal rate.
26 The approximate amount due to DPI for the windows and doors is the sum of \$103,000,
27 plus interest, storage, shipping and handling charges. The approximate amount due to
28 DPI for architectural and design services for the above referenced design and construction

1 projects at Sherwood Forest, White Deer Mountain, Sausalito Main House, Stillwell
2 Point, the Ranch House, the Tea House, and the Green House, is \$315,000, plus interest.
3 The approximate total due and owing by Phillips to DPI is \$418,000.

4 WHEREFORE, DPI prays for relief as set forth below.

5 **SECOND CAUSE OF ACTION**

6 **COMMON COUNT**
7 **(By DPI Against Phillips)**

8 17. Counter-Claimants incorporate herein by reference each and every
9 allegation contained in paragraphs 1 through 16 with the same force and effect as if fully
10 recited herein.

11 18. Phillips became indebted to DPI for work, labor, services, and materials
12 provided to Phillips at the specific request of Phillips.

13 After providing all credits for payments made by Phillips, the balance of \$418,000 was
14 demanded in writing and is due to DPI for architectural and design services and work and
15 materials. Phillips expressly and impliedly agreed to pay DPI this balance, plus all
16 additional costs associated with such work, labor, services, and materials.

17 19. Although demanded by DPI, there is now due and owing and unpaid
18 from Phillips to DPI the sum of \$418,000, together with interest thereon from the time
19 such payments become due, plus additional sums due and anticipated for storage, shipping
20 and handling charges for the windows and doors.

21 WHEREFORE, DPI prays for relief as set forth below.

22 **THIRD CAUSE OF ACTION**

23 **COMMON COUNT IN QUANTUM MERUIT**
24 **(By DPI and Diamond Against Phillips)**

25 20. Counter-Claimants incorporate herein by reference each and every
26 allegation contained in paragraphs 1 through 16 with the same force and effect as if fully
27 recited herein.

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1 21. Counter-Claimants furnished work, labor, services and materials at the
2 request of Phillips, for which Phillips agreed to pay to Plaintiff the reasonable value of
3 such work, labor, services and materials.

4 22. The reasonable value of the work, labor, services and materials provided
5 is \$418,000 together with interest thereon from the time such payments become due, plus
6 additional sums due and anticipated for storage, shipping and handling charges for the
7 windows and doors.

8 23. Phillips has failed and refused, and continues to fail and refuse, to
9 reimburse Counter-Claimants for the reasonable and customary value of Counter-
10 Claimants work, labor, services and materials as required by law, and instead maintains
11 that Phillips has overpaid Counter-Claimants and owes nothing further on account of the
12 windows and doors.

13 WHEREFORE, Plaintiff prays for judgment as hereinafter set forth.

14 **FOURTH CAUSE OF ACTION**

15 **UNJUST ENRICHMENT**
16 **(By DPI and Diamond Against Phillips)**

17 24. Counter-Claimants incorporate herein by reference each and every
18 allegation contained in paragraphs 1 through 16 with the same force and effect as if fully
19 recited herein.

20 25. Because of the conduct of Phillips and the reliance of Counter-Claimants,
21 injustice would be avoided only by enforcing Phillips promises and representations, and
22 paying to Counter-Claimants the equitable, fair and customary value for the work, labor,
23 services and materials provided to Phillips.

24 26. If Phillips promises and representations are not enforced and Counter-
25 Claimants are not provided the remedies prayed for herein, Phillips would be unjustly
26 enriched by the equitable, fair and customary value of the work, labor, services and
27 materials provided to Phillips.

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CERTIFICATE OF SERVICE

I hereby certify that Defendants JOHN D. DIAMOND'S and DIAMOND PHILLIPS, INC.'S Counter-Claim for Breach of Contract, Common Count, Common Count in Quantum Meruit, Unjust Enrichment; Demand for Jury Trial was served electronically on October 15, 2007, on the individuals on the attached Service List.


Kelli R. Bremer

1 *Phillips v. Diamond, et al.*

2 USDC-Northern District, San Francisco Division, Action No. C073305 SI

3 **SERVICE LIST**

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